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SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. The UNITED STATES FISH AND WILDLIFE SERVICE and DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, Defendants.	No. 3:07cv02379-W (NLS) **STIPULATED SETTLEMENT AGREEMENT AND ORDER**

Plaintiff, Center for Biological Diversity ("CBD"), and Federal Defendants, the United States Fish and Wildlife Service and Dirk Kempthorne, Secretary of the United States Department of the Interior (collectively "Service"), by and through their undersigned counsel, state as follows:

WHEREAS, on October 13, 1998, the Service listed spreading navarretia, *Navarretia fossalis,* and thread-leaved brodiaea, *Brodiaea filifolia,* as threatened under the Endangered Species Act, 63 Fed. Reg. 54,975 (Oct. 13, 1998);

WHEREAS, pursuant to 16 U.S.C. § 1533(b)(5), on October 7, 2004, the Service issued a proposed critical habitat rule for spreading navarretia, 69 Fed. Reg. 60,110 (Oct. 7, 2004);

WHEREAS, pursuant to 16 U.S.C. § 1533(b)(2) and 16 U.S.C. § 1533(b)(6)(A), on October 18, 2005, the Service issued a final rule designating critical habitat for spreading navarretia, 70 Fed. Reg. 60,658 (Oct. 18, 2005); 50 C.F.R. § 17.96(a);

WHEREAS, on December 8, 2004, the Service issued a proposed critical habitat rule for thread-leaved brodiaea, 69 Fed. Reg. 71,284 (Dec. 8, 2004);

WHEREAS, on December 13, 2005, the Service issued a final rule designating critical habitat for thread-leaved brodiaea, 70 Fed. Reg. 73,820 (Dec. 13, 2005); 50 C.F.R. § 17.96(a);

WHEREAS, on December 19, 2007, CBD filed a complaint for declaratory and injunctive relief, challenging the Secretary's designations of critical habitat pursuant to 16 U.S.C. § 1540(g)(1)(C);

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to CBD's claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in CBD's complaint;

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

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NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Service agrees to re-consider its critical habitat designations for spreading navarretia and thread-leaved brodiaea.

2. On or before May 29, 2009, the Service shall submit to the *Federal Register* a new proposed critical habitat rule, pursuant to 16 U.S.C. § 1533(a)(3)(B) and 16 U.S.C. § 1533(b)(5), for spreading navarretia.

3. The Service will submit a final determination on the new proposed critical habitat rule for spreading navarretia, pursuant to 16 U.S.C. § 1533(b)(6), to the *Federal Register* by May 28, 2010.

4. On or before December 1, 2009, the Service shall submit to the *Federal Register* a new proposed critical habitat rule, pursuant to 16 U.S.C. § 1533(a)(3)(B) and 16 U.S.C. § 1533(b)(5), for thread-leaved brodiaea.

5. The Service will submit a final determination on the new proposed critical habitat rule for thread-leaved brodiaea, pursuant to 16 U.S.C. § 1533(b)(6), to the *Federal Register* by December 1, 2010.

6. Until the effective dates of the determinations referenced in Paragraphs 3 and 5, the existing designations of critical habitat for spreading navarretia and thread-leaved brodiaea, see 50 C.F.R. § 17.96(a), shall remain in place and effective.

7. The Order entering this Settlement Agreement ("Agreement") may be modified by Magistrate Judge Nita L. Stormes upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by Magistrate Judge Nita L. Stormes, or upon written motion filed by one of the parties and granted by Magistrate Judge Nita L. Stormes, as provided by Paragraph 21 herein. In the event that either party seeks to modify the terms of this Agreement, including the deadline for the actions specified in Paragraphs 2-5, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute or seeking enforcement, shall provide the other party with written notice of the claim. The parties agree that they will meet and confer (in-person

not required) at the earliest possible time in a good-faith effort to resolve the claim before pursuing relief from Magistrate Judge Nita L. Stormes. If the parties are unable to resolve the claim after the meet and confer, either party may pursue relief from Magistrate Judge Nita L. Stormes, as provided by Paragraph 21 herein.

8. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute lawful designation of critical habitat, in any other proceeding involving the Service's implementation of the ESA.

9. Defendants agree that Plaintiff is the "prevailing party" in this action, and agree to pay to Plaintiff reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540 (g). Therefore, Defendants agree to settle all of Plaintiff's claims for costs and attorneys' fees in the above-captioned litigation for a total of $7,000.00. A check will be made payable in that amount to Plaintiff's undersigned counsel, Center for Biological Diversity, c/o Lisa T. Belenky, 351 California St., Suite 600, San Francisco, CA 94104.

10. Defendants agree to submit all necessary paperwork for the processing of the attorneys' fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this stipulation.

11. Plaintiff agrees to accept payment of $7,000.00 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiff is entitled in the above-captioned litigation, through and including the date of this agreement.

12. Plaintiff agrees that receipt of this payment from Defendants shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter, through and including the date of this agreement.

13. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this agreement arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in Paragraphs 2-5, or for any other unforseen continuation of this action.

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14. By this agreement, Defendants do not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any future litigation, or continuation of the present action. Further, this stipulation as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

15. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the Endangered Species Act, the Administrative Procedure Act, or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Service by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination.

16. No provision of this Agreement shall be interpreted as, or constitute, a commitment, or requirement, that Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

17. The parties agree that this Agreement was negotiated in good faith and constitutes a settlement of claims that were disputed by the parties. By entering into this Agreement no party waives any claim or defense.

18. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

19. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement.

20. Upon approval of this Agreement by the Court, all counts of Plaintiff's Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

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21. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request that the Court refer the matter to Magistrate Judge Nina L. Stormes, who shall retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

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Dated: July 22, 2008

/s/ Lisa T. Belenky
Lisa T. Belenky
CENTER FOR BIOLOGICAL DIVERSITY

Attorney for Plaintiff

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures of the United States District Court for the Southern District of California, I certify that the content of this document is acceptable to counsel for the Plaintiff and that I have obtained authorization from Lisa T. Belenky to affix her electronic signature to this document.

Dated: July 22, 2008

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
LISA L. RUSSELL, Assistant Section Chief

/s/ Lawson E. Fite
LAWSON E. FITE, Trial Attorney
U.S. Department of Justice
Wildlife & Marine Resources Section
Environment & Natural Resources Division

Attorneys for Defendants

ORDER

The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as an enforceable ORDER of this Court, and this matter is hereby DISMISSED with prejudice.

Entered this 25th day of July 2008.

The Honorable Thomas J. Whelan
United States District Judge